

E-002, 123/SA-89-1092 DENYING PETITION, AND DENYING COUNTER PETITION AND COMPLAINT IN PART

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Darrel L. Peterson	Chair
Cynthia A. Kitlinski	Commissioner
Norma McKanna	Commissioner
Robert J. O'Keefe	Commissioner
Patrice Vick	Commissioner

In the Matter of the Petition of Northern States Power Company to Amend the Electric Service Area Boundary with Minnesota Valley Cooperative Light and Power Association in Montevideo, Minnesota

ISSUE DATE: July 25, 1990

DOCKET NO. E-002, 123/SA-89-1092

ORDER DENYING PETITION, AND
DENYING COUNTER PETITION AND
COMPLAINT IN PART

PROCEDURAL HISTORY

On November 2, 1989, Minnesota Valley Cooperative Light and Power Association (Minnesota Valley or the co-op) filed a complaint alleging that Northern States Power Company (NSP) had extended or was preparing to extend electric service to a plant expansion under construction by one of the co-op's industrial customers, Innovex, Inc. The construction was taking place on a lot in the Airport Industrial Park in Montevideo. The co-op alleged that the construction site lay within its assigned service area and that service by NSP would violate Minnesota's assigned service area statutes, Minn. Stat. §§ 216B.37 et seq. (1988).

After notice and hearing, the Commission found that the plant expansion site lay within Minnesota Valley's assigned service area. The Commission also prohibited NSP from providing service unless and until one of the following events occurred: the official service area maps were amended to place the plant expansion within NSP's service territory; Minnesota Valley consented to service by NSP; or the Commission approved such service. In the Matter of the Complaint by Minnesota Valley Cooperative Light and Power Association Against Northern States Power Company for Providing or Intending to Provide Electric Service to Innovex, Inc. in Montevideo, Minnesota, Docket No. E-002, 123/C-89-984, ORDER PROHIBITING PROVISION OF ELECTRIC SERVICE OR REQUIRING ITS CESSATION (December 15, 1989).

On December 6, 1989, NSP filed a petition to change the boundary between its assigned service area and that of Minnesota Valley. NSP claimed that the boundary between the two utilities was incorrect as a matter of law and should have been drawn to conform to their municipal franchise boundaries as of April 12, 1974, under Minn. Stat. § 216B.39, subd. 5 (1988). The company asked the Commission to change the boundary to coincide with the two utilities' franchise boundaries on April 12, 1974. This change would place the Innovex site, and several other lots in the industrial

park, within NSP's assigned service area.

In the alternative, NSP asked the Commission to change the two utilities' boundaries to reflect more accurately an equidistant line between their electric lines as they existed on April 12, 1974. The company claimed that, when the two utilities agreed on their current service area boundaries, they mistakenly applied the equidistant line provisions of Minn. Stat. § 216B.39, subd. 5 (1988) and inadvertently drew a line placing too much territory within Minnesota Valley's assigned service area. The requested change would place a portion of the Innovex site within NSP's assigned service area.

On January 18, 1990, Minnesota Valley filed a Response, Counter Petition, and Complaint. The co-op opposed changing the assigned service area boundaries, sought \$4,564.30 in attorney's fees, and sought \$8,305 in damages for an alleged increase in the cost of installing service to the plant expansion due to NSP's earlier installation. The co-op also asked the Commission to order NSP to remove its facilities from the Innovex lot.

The Department of Public Service (the Department) intervened in the case and recommended that the Commission change the official service area maps to conform to the 1974 franchise boundaries. At the same time, the Department recommended amending the new service area boundaries to include the Innovex plant site within Minnesota Valley's service area.

The matter came before the Commission on June 26, 1990.

FINDINGS AND CONCLUSIONS

Factual Background and the Positions of the Parties

The assigned service areas of NSP and Minnesota Valley were set by the Commission in 1975. The two utilities signed a contract setting forth their agreement on their service area boundaries and filed it with the Commission under Minn. Stat. § 216B.39, subd. 4 (1988). That statute authorized and encouraged utilities to enter into such contracts, which established official service area boundaries upon approval by the Commission. The Commission approved the boundaries proposed by NSP and Minnesota Valley and duly recorded them on the official service area maps.

NSP's Position

NSP now claims that when it negotiated the service area contract with Minnesota Valley, both utilities failed to recognize that the statute required their service area boundaries to conform to the municipal franchise boundaries in effect on April 12, 1974. Minn. Stat. § 216B.39, subd. 5 (1988). At that time, NSP held a non-exclusive city-wide franchise, and Minnesota Valley had a franchise

to serve one lot (not the Innovex lot) in the industrial park.¹ NSP argues that the utilities were therefore legally obligated to place all of the city, except the lot the co-op was franchised to serve, within NSP's service territory.

NSP claims the two utilities were operating under a mistake of law and believed that they should draw a line equidistant between their existing electric lines to form their service area boundary. That procedure was required where there was no franchise or where boundaries were being drawn outside municipalities. Minn. Stat. §§ 216B.39, subds. 3 and 5 (1988). Since both utilities held franchises in this case, NSP contends their service area boundaries should have coincided with their franchise boundaries. NSP urges the Commission to correct this alleged legal error now by honoring the franchise boundaries in effect in 1974.

NSP also claims that an accurately drawn equidistant line reflecting the 1974 location of both utilities' electric lines would place a portion of the Innovex site within the assigned service area of NSP. If the Commission declines to honor the 1974 franchise boundaries, NSP urges the Commission to effectuate the alleged 1974 intent of the parties by correcting their drafting error to place the Innovex site within NSP's service area.

NSP also states it has no objection to Minnesota Valley continuing to serve the portion of the Innovex plant which it has always served. NSP would serve only the plant expansion, unless Innovex installed the facilities necessary to convert the entire plant to receive NSP service at Innovex's own expense.

Minnesota Valley's Position

The co-op states that the existing boundary was properly set by agreement between the two utilities, that the utilities had the right to agree to boundaries different from those of their municipal franchises, that NSP has waived or is estopped from asserting any claim it had under the municipal franchise provisions of the statute, that the co-op has made substantial investments to serve Innovex and would be entitled to compensation if NSP were allowed to serve, and that the public interest requires retention of the existing service area boundaries.

The Department's Position

The Department argues that the municipal franchise provisions of the statute override the provisions allowing utilities to set their service areas by agreement. The Department recommends changing the service area boundaries to conform with the 1974 municipal franchise boundaries, but amending the new boundaries to place Innovex within the co-op's service area. The Department based this second recommendation on the public policy favoring service area stability and disfavoring the disruption of established service arrangements.

¹ The co-op also had a pole, a line, and a transformer in place on the Innovex site, which was vacant at the time but had been the location of a previous co-op customer. The co-op had had a line there since the lot began receiving electric service in 1944.

The Significance of the 1974 Franchise Boundaries

The statutory provisions regarding the role of municipal franchises in determining the boundaries of the original assigned service areas read as follows:

Where a single electric utility provides electric service within a municipality on April 12, 1974, that entire municipality shall constitute a part of the assigned service area of the electric utility in question. Where two or more electric utilities provide electric service in a municipality on April 12, 1974, the boundaries of the assigned service areas shall conform to those contained in municipal franchises with the electric utilities on April 12, 1974. In the absence of a franchise, the boundaries of the assigned service areas within an incorporated municipality shall be a line equidistant between the electric lines of the electric utilities as they exist on April 12, 1974; provided that these boundaries may be modified by the commission to take account of natural and other physical barriers including, but not limited to, major streets or highways, waterways, railways, major bluffs and ravines and shall be modified to take account of the contracts provided for in subdivision 4.

Minn. Stat. § 216B.39, subd. 5 (1988).

This subdivision must be read in conjunction with subdivision 4, which encourages utilities to enter into contracts establishing their assigned service areas. It is undisputed that the two utilities in this case entered into such a contract, and that the contract places Innovex within Minnesota Valley's assigned service area.

This subdivision must also be read in conjunction with subdivision 6, which directs the Commission to set boundaries in accordance with underlying legislative policies when the electric lines of utilities are so intertwined as to prevent the reasonable application of other statutory subdivisions. Since Minnesota Valley had a pole, an electric line, and a transformer in place on the Innovex site when the boundaries were drawn, it is possible that this subdivision justified assigning portions of NSP's franchised area to the co-op.

Minn. Stat. § 216B.40 (1988) must also be considered. That statute allows utilities to serve customers in other utilities' assigned service areas upon written consent of the assigned utility. NSP signed a contract allowing Minnesota Valley to serve Innovex and adjacent lots in the industrial park; it could be argued that this constituted written consent under the statute.

In short, it is by no means clear that the existing service area boundaries were drawn incorrectly as a matter of law. The Commission believes, however, that that is not the crucial issue in this case. Instead, the crucial issue whenever the Commission is asked to change service area boundaries is whether the public interest requires the requested change. See In the Matter of City of White Bear Lake's Request for an Electric Utility Service Area Change Within its City Limits and In the Matter of the Petition of Northern States Power Company for an Electric Utility Service Area Change Within the City of White Bear Lake, 443 N.W.2d 204 (Minn.App. 1989). As the Court stated in that case:

The MPUC may alter the service area boundaries of public utilities providing electric service within a municipality if doing so would provide more efficient, reliable, and cost-effective service or would otherwise serve the public interest.

White Bear Lake at 207.

The White Bear Lake case made it clear that boundaries set in accordance with the requirements of Minn. Stat. § 216B.39 (1988) are not immutable and that the Commission should examine petitions to change assigned service areas in light of the current public interest. Although the Court found that the Commission had properly set the boundary at issue in accordance with statutory dictates, the Court required the Commission to re-examine the appropriateness of that boundary in light of the current public interest.

The Commission concludes that it must weigh the competing claims of NSP and the co-op in light of the broad public interest and the policies embodied in the Public Utilities Act. Since this is the critical inquiry, it is unnecessary to determine whether or not the service area boundaries were properly set in 1975.

The Public Interest Standard

The Commission will consider the service area change requested by NSP in light of the statutory standards set forth at Minn. Stat. § 216B.37 (1988): the encouragement of coordinated statewide electric service, the elimination of unnecessary duplication of electric utility facilities, and the promotion of economical, efficient, and adequate electric service to the public. The Commission will balance the advantages of the requested change against its disadvantages, in light of these statutory criteria and the public policies they represent.

Potential Benefits of the Requested Change

NSP claims that the requested service area change would serve the public interest by providing more reliable service to Innovex and other customers in the industrial park, by honoring Innovex's preference to receive service from NSP, and by eliminating the duplication of facilities inherent in allowing both utilities to serve the industrial park. Each claim will be examined in turn.

Service Reliability

The NSP substation serving its portion of the industrial park is located approximately two miles from Innovex; Minnesota Valley's substation is approximately seven miles from the Innovex site. NSP states that the proximity of its substation, plus a loop system allowing it to deliver power from two different directions, make its service more reliable than Minnesota Valley's.

Clearly, reliability is a factor the Commission is to consider in amending assigned service areas. Reliability goes to "the promotion of economical, efficient, and adequate electric service to the public." Minn. Stat. § 216B.37 (1988), emphasis added.

However, the Commission does not agree that NSP's service within the industrial park is more reliable than Minnesota Valley's. Minnesota Valley's service meets all applicable Commission standards. The co-op does not have a history of significant service problems. NSP has offered no factual evidence of substandard service. Innovex, which has stated it prefers NSP service, has not alleged that it has had problems with Minnesota Valley's service.

Under these circumstances, the Commission sees no need to change the service area boundaries at issue on the basis of reliability.

Customer Preference

NSP argues that Innovex's preference should be given some weight in determining which utility

should serve. The Commission does not rule out the potential relevance of customer preference, where that preference goes to the statutory factors affecting service area determinations.

Generally, however, the Commission's focus must be on the effect of proposed service area changes on the coordinated, efficient delivery of adequate electric service throughout the state. The statute assumes, and the Commission agrees, that the interests of individual customers are best served by ensuring the statewide availability of high quality, economical electric service.

The existence of multiple utilities guarantees that there will be rate differences and other perceived differences which will lead customers in individual cases to desire service from a utility other than the one assigned. The statewide need for service area stability, however, discussed below, generally precludes granting such requests. The service area statutes grant customers the right to select a non-assigned utility under carefully limited circumstances. Minn. Stat. §§ 216B.42 and 216B.421 (1988). Under all other circumstances, the assigned service area boundaries control.

The reasons Innovex gave for preferring NSP service do not compel a careful weighing of statewide and individual customer interests. The Innovex representative who addressed the Commission stated that he had had difficulty deciding which utility should serve, but, since he thought he had to make a choice, he did some research and settled on NSP. Clearly, Innovex's preference is not based on deep-seated dissatisfaction with Minnesota Valley's service.

Furthermore, Innovex's letter to the Department, explaining its preference for NSP, suggests that the preference is based in part on philosophical disagreement with the cooperative concept. Exhibit 3, Reply Comments of NSP. While such disagreement is Innovex's prerogative, it clearly is not grounds for a service area change. The Public Utilities Act recognizes cooperatives, municipalities, and investor-owned utilities as equally appropriate providers of electric service. Minn. Stat. § 216B.01 (Supp. 1989).

The Commission concludes that, in this case, customer preference does not constitute serious cause to consider a service area change.

Duplication of Facilities

NSP contends that allowing both utilities to serve the industrial park perpetuates the unnecessary duplication of facilities which the assigned service area statutes were enacted to avoid. In support of this claim, NSP relies heavily on its loop system, installed in October of 1989, and on the fact that its line to the Innovex plant expansion was already in place when Minnesota Valley extended service. The company also argues that allowing both utilities to serve one industrial park inevitably results in unnecessary duplication of facilities.

The Loop System -- NSP installed its loop system through Minnesota Valley's service area to provide more reliable service to customers in its own service area. The system was constructed under Minn. Stat. § 216B.40 (1988), which grants utilities the right to construct lines through each other's service areas when such construction is necessary to serve their own customers. It is essential that utilities cooperate in the construction of such lines if all Minnesotans are to receive

safe, reliable, and economical electric service. There are strong public policy reasons for giving such lines little, if any, weight in examining requests for service area changes.

It would subvert the purpose of this statute and the public policy underlying assigned service areas to use lines constructed under Minn. Stat. § 216B.40 (1988) as the basis for changing service area assignments. It would discourage the cooperation and trust between utilities which are crucial to the coordinated delivery of electric service throughout the state. It would involve the Commission in countless disputes in which utilities challenged the good faith and necessity underlying planned construction of lines through one another's service territories.

In the past year, the Commission has seen a proliferation of service area disputes between utilities. To use lines constructed under Minn. Stat. § 216B.40 (1988) as the basis for service area changes would exacerbate tensions and create a new category of service area complaints. Utilities would have good cause for concern whenever one alleged a need to cross another's service area. They would be forced to consider whether such construction was being undertaken for ulterior purposes and would request a Commission ruling if there was the slightest doubt. This would be an inefficient use of resources for all involved. It would also impair the cooperation between utilities which the public has come to take for granted.²

Furthermore, any line constructed through another utility's service territory has the capability of delivering service within the service territory it crosses. This had to be obvious to the legislature when it decided to allow such lines to be built. Clearly, the legislature did not intend for service territories to be subject to constant adjustment to prevent the minor, inadvertent duplication of facilities such lines cause.

The Commission concludes that any duplication of facilities attributable to the loop system is inadvertent and inconsequential for purposes of service area changes.

NSP's Lines to Innovex -- NSP also claims that Minnesota Valley's lines to the plant expansion should be viewed as the unnecessary duplication of facilities, since NSP already had lines in place to serve the plant expansion. The Commission disagrees.

When NSP installed service to the plant expansion, the official service area maps clearly showed the plant expansion to be within Minnesota Valley's assigned service area. As the Commission found in its ORDER PROHIBITING PROVISION OF ELECTRIC SERVICE OR REQUIRING ITS CESSATION, it is extremely important that utilities honor assigned service area boundaries unless and until they are changed by the Commission or the assigned utility consents to service at variance with their provisions. It would be at odds with the statutes' emphasis on service area stability, would be inequitable, and would invite chaos for the Commission to prohibit an assigned utility from serving within its assigned service area because such service would duplicate facilities improperly installed by another utility.

² This cooperation is evidenced by joint repair efforts after storms and natural disasters, emergency power-sharing and back-up arrangements, and similar undertakings.

The Commission therefore finds that Minnesota Valley's lines to the plant expansion do not constitute the unnecessary duplication of the lines previously installed by NSP.

Allowing Both Utilities to Serve the Park -- NSP also claims that it is duplicative for both utilities to provide service within Montevideo's industrial park. The Commission agrees that under some circumstances the public interest would require assigning a single utility to serve a discrete area such as an industrial park or a housing development. Here, however, there is no such need.

If this were a case in which one or both utilities would have to make substantial new investments to serve their portions of the park, the public interest might require assigning the entire park to one utility. Here, however, both utilities have adequate facilities and capacity to serve their portions of the park without making substantial additional expenditures. Under these circumstances, there is no public harm in allowing both utilities to serve.

As long as there are multiple utilities operating within the state, there will be situations like the present one in which two utilities operate side by side. This will always result in some duplication of facilities, which is no doubt why the statute speaks of avoiding unnecessary duplication of facilities. It will also result in disputes about where the ideal official boundary line should be. Unless there are sound reasons in particular cases for changing boundary lines, however, changing them will merely change the site, not the nature, of such controversies.

The Commission concludes that allowing both utilities to serve different portions of the Montevideo industrial park does not constitute the unnecessary duplication of facilities.

The Disadvantages of the Requested Change

Financial Damage to the Co-op and its Members

If the Commission were to grant the service area change requested by NSP, Minnesota Valley would lose its seventh largest member,³ or, at the least, lose a lucrative new load. The co-op's remaining ratepayers would be left to shoulder the burden from any expansion of facilities or capacity the co-op had undertaken to serve Innovex⁴ or to serve anticipated growth within the industrial park. They would also be forced to shoulder a higher portion of the utility's fixed and common costs than if

³ This assumes that Innovex would ultimately take all its service from NSP, not just service to its plant expansion. This is a logical assumption, since Innovex has expressed a preference for NSP and has already secured an estimate of the cost of converting the entire plant to NSP service. The amount of that estimate was \$10,000.

⁴ The co-op places the cost of this expansion at \$25,192.

Innovex and future industrial park tenants were sharing those costs.⁵ Clearly, the co-op and its ratepayers would be damaged financially by the transfer of this portion of Minnesota Valley's service territory to NSP.

Damage to Service Area Stability

Another disadvantage of granting NSP's request to amend the service area boundaries of these two utilities is that it would undermine the confidence of the public and the utilities in the integrity of assigned service areas. As the Commission has noted before, service area stability is essential for the orderly provision of reliable electric service throughout the state.

The generation, transmission, and distribution of electricity is an extremely capital-intensive business. Utilities must be willing and able to commit large amounts of capital to building and maintaining the facilities necessary to deliver power throughout their service territories. Since power plants require years of planning and construction, utilities must also be willing to commit these resources years in advance of actual need.⁶ They do this in reliance on carefully drawn long range plans.

Without service area stability, long range planning by utilities would be meaningless. They would have little incentive to commit current resources to meet future need, and the public would have little right to require it. That is why the legislature considered exclusive service areas essential to the development of economical, efficient, and adequate electric service throughout the state.

This is not to say, of course, that service area stability is an end in itself; it is merely a means of achieving the statewide coordinated electric service sought by the legislature. Since service area stability is crucial to achieving that goal, however, it is important that assigned service areas not be changed except when the broad public interest requires it.

Otherwise, utilities' confidence in the integrity of their service areas, and their willingness to invest to meet future needs, could be compromised. Similarly, utilities might feel compelled to devote time and resources, which would be better spent serving their customers, to protecting their service area rights. They might, for example, engage in unnecessary duplication of facilities to make it unmistakably clear that they were serving every part of their assigned service areas. None of these developments would serve the public interest, ratepayers' interests, or the goal of ensuring adequate and economical electric service throughout the state.

⁵ It is possible, if not likely, that Minnesota Valley would have a due process right to compensation for transfer of this portion of its service area to NSP. Since the Commission has found no public interest in such a transfer, the Commission need not reach that issue.

⁶ See Minn. Stat. § 216B.04 (1988), requiring public utilities to provide service within 90 days of any application for service.

The Commission concludes that service area stability, an important statutory goal, would be damaged by granting NSP's petition.

Commission Action

The Commission will deny NSP's petition to amend the assigned service area boundary between itself and Minnesota Valley in Montevideo, Minnesota. The Commission believes that, whether or not the original service area assignments complied with statutory guidelines, the crucial issue in considering service area changes is the current public interest.

The Commission finds that the requested service area change would cause financial damage to the co-op and its ratepayers and would undermine the service area stability essential to the orderly development of adequate and economical statewide electric service. These disadvantages are not offset by the advantage of having a single utility serve the industrial park, by any increase in reliability attributable to NSP's loop system, by deferring to customer preference, or by eliminating the minor duplication of facilities attributable to allowing both utilities to serve the park. The Commission will therefore deny the petition.

The Co-op's Claims for Relief

The co-op, in its counter petition and complaint, sought \$4,564.30 in attorney's fees and \$8,305 in damages for an alleged increase in the cost of installing service to the plant expansion due to NSP's earlier installation of service. The co-op also asked the Commission to order NSP to remove its facilities from the Innovex lot.

The Commission has no statutory authority to award damages and attorney's fees in a case of this nature and will not do so.

The Commission agrees with the co-op that NSP should remove the facilities it installed to provide service to the Innovex plant expansion. Since NSP will not be providing service to Innovex, those facilities serve no useful purpose. The loop system may remain, since such facilities are expressly permitted under Minn. Stat. § 216B.40 (1988).

ORDER

1. Northern States Power Company's petition to change its service area boundary with Minnesota Valley Cooperative Light and Power Association in Montevideo, Minnesota is denied.
2. Minnesota Valley's Counter Petition and Complaint are denied, except insofar as they seek the removal of NSP facilities installed to provide service to the Innovex plant expansion.
3. Within 30 days of the date of this Order, NSP shall remove the facilities it installed to provide service to the Innovex plant expansion.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)